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10   IN THE UNITED STATES DISTRICT COURT

11   FOR THE NORTHERN DISTRICT OF CALIFORNIA

12

13
   UNITED STATES OF AMERICA,   )   No. CR 07-0764 SI
14   )
15   Plaintiff,   )   DEFENDANT'S REPLY RE:
)   ARRAIGNMENT ON
16   v.   )   IMPROPER STATUTORY
)   MAXIMUM SENTENCES
17   )
   JUAN HERRERA-SANTOS,   )
18   )   **Hearing Date**: Dec. 19, 2007
)
19   Defendant.   )
   _____   )

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Herrera-Santos, CR 07-0764 SI
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11   )
            Plaintiff,   )
12   )   DEFENDANT'S REPLY RE:
       v.   )   ARRAIGNMENT ON
13   )   IMPROPER STATUTORY
   JUAN HERRERA-SANTOS,   )   MAXIMUM SENTENCES
14   )
            Defendant.   )
15 ————————————————————————————   )   **Hearing Date**: Dec. 19, 2007
16   **Introduction**
17   The United States Attorney's Office for the Northern District of California is the
18 only USAO in California that has not changed its illegal reentry indictments to reflect the
19 requirements of *Salazar-Lopez*. The problems presented by the government's Opposition
20 illustrate why every other USAO in the state now simply indicts these cases correctly.
21   The government's Opposition betrays a fundamental misunderstanding of the
22 precepts of *Apprendi*, and is directly contrary to the controlling decision of *United States*
23 *v. Salazar-Lopez*, 506 F.3d 748 (9th Cir. 2007). Of equal concern, the Opposition
24 improperly relies on a harmless error standard that is only relevant on appeal.
25   This Court should decline the government's invitation to advise illegal reentry
26 defendants of erroneous maximum penalties, and should re-arraign Mr. Herrera-Santos
27 with the correct advisement: that the offense for which he is now charged carries a two-
28 year statutory maximum sentence.

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Discussion

2
3   **I.   The *Herrera-Santos* Indictment Does Not Allege an Offense Carrying a
        Twenty-Year Statutory Maximum Penalty or Three Years of Supervised
        Release**

4
5   The government's reading of *Salazar-Lopez* is incorrect, and squarely contradicts

6   the language and holding of the decision. In its Opposition, the government asserts:

7   The Ninth Circuit affirmed the [Salazar-Lopez] sentence based on harmless error,
        holding that the indictment should have alleged 'the date of the removal, or at least
8   the fact that [the defendant] had been removed *after* his conviction" . . . *Nothing in
        the opinion supports the defendant's claim that the indictment must allege both.*

9

10 *Gov't Opp.* at 5:23-26 (emphasis added).

11   This is a remarkable assertion, given the first paragraph of the *Salazar-Lopez*

12 decision:

13   [F]or a defendant convicted of being a previously removed alien found in the
        United States, in violation of 8 U.S.C. § 1326, we must resolve whether *the dates
14   of a previous felony conviction **and** of a previous removal from the United States,
        subsequent to that conviction, must be alleged in the indictment* and proved to a
15   jury for the defendant to be subject to an increased sentence under 8 U.S.C. §
16   1326(b). We answer that question in the affirmative.

17

18 *United States v. Salazar-Lopez*, 506 F.3d 748, 749-50 (9th Cir. 2007) (emphases added).

19   The Ninth Circuit's articulation of the issue in *Salazar-Lopez* was clear; its

20 holding, emphatic. An indictment that seeks to create the higher statutory maximum

21 sentences contemplated in Section 1326(b) must allege the date of a previous conviction

22 for an enumerated offense and the date of a previous removal that is subsequent to that

23 conviction. *Id.* For the government to assert that "nothing in the opinion supports the

24 defendant's claim that the indictment must allege both" ignores the core issue and central

25 holding of the decision.

26   The government's Opposition reassures the Court that "[b]ecause the indictment in

27 this case alleges eight dates of removal, it satisfies *Salazar-Lopez*. The judge can

28 determine whether the felony conviction or aggravated felony conviction occurred after

    the removal date found by jury." *Gov't Opp.* at 5-6.

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1   This argument misapprehends the *Apprendi* error in *Salazar-Lopez*, and repeats the

2   error in the present case. Plainly stated, there is an enhancement fact in Section 1326 of

3   Title Eight that increases the statutory maximum sentence from two years to ten, or to

4   twenty, years. That enhancement fact is not the date of a prior enumerated conviction, nor

5   is it – as the government contends – the date of a removal from the United States. *See*

6   *Gov't Opp.* at 5-6. The enhancement fact that increases the statutory maximum sentence

7   in Section 1326 is instead "the temporal relationship between [an alien's] removal and his

8   previous conviction." *Salazar-Lopez*, 506 F.3d at 752. It is not enough that an alien

9   suffered a conviction for one of the enumerated offenses, or that he was removed. Instead,

10   the grand jury must be presented with evidence, and must allege in an indictment, that the

11   alien's removal *followed* a conviction for one of the enumerated offenses in order to

12   trigger the dramatically higher statutory maximum sentences. *Id.* ("As such, the date of

13   the removal, or at least the fact that Salazar-Lopez had been removed *after* his conviction,

14   should have been alleged in the indictment and proved to the jury.") (emphasis in

15   original).

16   It is undisputed that the *Herrera-Santos* indictment now before the Court does not

17   allege that the defendant was removed after suffering a conviction for an enumerated

18   offense. As such, it omits the core enhancement fact that was at the heart of the *Salazar-*

19   *Lopez* decision: the temporal relationship between conviction and removal. Without that

20   enhancement fact the indictment before the Court alleges a valid crime that carries a two

21   year statutory maximum sentence and one year period of supervised release. The Court's

22   earlier advisement of a twenty year statutory maximum sentence and a three year term of

23   supervised release (at the request of the government) was erroneous. The defendant

24   should be re-arraigned, and informed of the correct statutory penalties, at the next

25   appearance before this Court.

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II.   It is Improper for the Government to Argue "Harmless Error" Outside of the Court of Appeals

In its initial oral argument to the Court on December 10, and in its Opposition filed December 12, the government defends its indictment by emphasizing that the Ninth Circuit undertook harmless error review in *Salazar-Lopez*:

> Even if the indictment in this case had not alleged any removal dates, failure to do so would be harmless error. Unlike in *Salazar-Lopez*, all of the defendant's removals occurred after he was convicted of an aggravated felony. Therefore, if he is convicted, it will not matter which removal or combination of removals the jury finds because any of his removals can increase his statutory maximum penalty. Thus, given the dates of removal alleged in the indictment, if the jury convicts, there will be no doubt that it found that the defendant was removed after an aggravated felony conviction.

Gov't Opp. at 6:3-9.

There are two objections to the government's reliance on harmless error in its Opposition; the first pragmatic and legal, the second, ethical.

First, as a pragmatic and legal matter, the government misapprehends the harmless error analysis in *Salazar-Lopez*. As discussed above, the core holding of *Salazar-Lopez* was that the enhancement fact of the temporal relationship between a prior conviction and removal must be alleged in an indictment to trigger the greater statutory maximum sentences of Section 1326. *Salazar-Lopez*, 506 F.3d at 749-50. The Ninth Circuit held that it was error not to allege this enhancement fact in the indictment. *Id.*

The next issue for the Court in *Salazar-Lopez* was how to approach this error: using the harmless error analysis, or as structural error that mandated reversal and remand for resentencing. *See id.* at 750 ("Second, we consider whether such error, in a context that affects only sentencing, is subject to harmless error analysis.")

The Court in *Salazar-Lopez* examined two previous Ninth Circuit decisions that had addressed deficiencies in the indictment: *United States v. Du Bo*, 186 F.3d 1177 (9th Cir. 1999), and *United States v. Jordan*, 291 F.3d 1091, 1095 (9th Cir. 2002). *See Salazar-Lopez*, 506 F.3d at 752-53. The *Du Bo* decision had found that indictment error

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1   was structural error (requiring reversal). *Id.* at 752. "[I]f properly challenged prior to trial,

2   an indictment's complete failure to recite an essential element of the charged offense not

3   a minor or technical flaw subject to harmless error analysis, but a fatal flaw requiring

4   dismissal of the indictment." *Id.* (*quoting Du Bo*, 186 F.3d at 1179)

5   The *Jordan* decision, by contrast, applied a harmless error analysis where the

6   defendant had not objected before trial, but had only objected to the pre-sentence report

7   on the basis of error in the indictment. *See id.* at 753 (*discussing Jordan*, 291 F.3d at

8   1094-95).

9   In *Salazar-Lopez*, the Court held that the procedural posture of the case was more

10 akin to that in the *Jordan* decision than to *Du Bo*:

11   We conclude that *Jordan* controls, and thus that harmless error analysis does
            apply. First and foremost, the procedural history of this case, the nature of
12   Salazar-Lopez's challenge, and the nature of the relief he requests mirror *Jordan*
13   much more closely than *Du Bo*. Like *Jordan*, Salazar-Lopez raised his *Apprendi*
            claim post-trial in his objections to the pre-sentence report, *see Jordan*, 291 F.3d at
14   1094-95, whereas in *Du Bo* the defendant objected to the indictment "[m]ore than
15   two months before trial," *see Du Bo*, 186 F.3d at 1179.

16 *Salazar-Lopez*, 506 F.3d at 753.

17
            Whatever the outcome of Mr. Herrera-Santos's prosecution, his early and repeated
18 objections will make the present case far more analogous to *Du Bo* than to *Jordan*. Weeks
19 before making an *initial appearance in the district court*, the defendant has specifically,
20 emphatically, and repeatedly objected to the error in the indictment. If the government
21 insists on proceeding on this indictment (and these purported statutory maximum
22 sentences) in the district court, Mr. Herrera-Santos will be moving for disclosure of grand
23 jury transcripts under Federal Rule of Criminal Procedure 6,[1] and for dismissal of the
24

25 _____

26   [1] Federal Rule of Criminal Procedure 6 permits disclosure of grand jury
    transcripts:
27
28   (E) The court may authorize disclosure – at a time, in a manner, and subject to any
        other conditions that it directs – of a grand-jury matter:

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1   indictment under *Du Bo*. Put plainly, by the time this case reaches the Ninth Circuit the

2   record will fairly bristle with objections to this indictment. Because Mr. Herrera-Santos's

3   objections are being made before trial (as was done in *Du Bo*), any appellate review will

4   employ the structural error approach, requiring reversal. The government's reassurance

5   that the course it urges will only be reviewed under the "harmless error" analysis is thus

6   unrealistically optimistic, and does not reflect Mr. Herrera-Santos's demonstrated resolve

7   to object to this indictment.

8   The second objection to the government's "harmless error" argument relates to the

9   propriety of this argument before the case is in the Court of Appeals.

10   The harmless error analysis used by the Ninth Circuit in *Salazar-Lopez* has no

11   relevance to the pre-trial challenge raised by Mr. Herrera-Santos in the magistrate court.

12   The only possible significance of the harmless error argument is to encourage this Court

13   to knowingly commit error, with the implicit reassurance that a conviction will withstand

14   appellate scrutiny.

15   It is improper for a representative of the federal government to urge a Court to

16   deliberately adopt known error, regardless of whether that error will or will not withstand

17   appellate scrutiny. *See* ABA Model Rules of Professional Conduct (Model Rules) Rule

18   3.8. cmt. [1] ("A prosecutor has the responsibility of a minister of justice and not simply

19   that of an advocate. This responsibility carries with it specific obligations to see that the

20   defendant is accorded procedural justice and that guilt is decided upon the basis of

21

22

23   (i) preliminarily to or in connection with a judicial proceeding;

           (ii) at the request of a defendant who shows that a ground may exist to

24   dismiss the indictment because of a matter that occurred before the grand

25   jury;

26

27   FED. R. CRIM. P. 6(e)(3)(E)(ii) (West 2007). In the present case, Mr. Herrera-Santos will

28   show grounds to believe that the grand jury was never presented with the fact that any of

    the alleged removals followed a conviction for an enumerated offense.

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1 sufficient evidence."); http://www.abanet.org/cpr/mrpc/rule_3_8_comm.html, visited

2 Dec. 14, 2007. The government's argument, "Even if the indictment in this case had not

3 alleged any removal dates, failure to do so would be harmless error," is entirely

4 appropriate in a Ninth Circuit appellate brief, after the trial is complete and all defense

5 objections have been made (or waived). *See Gov't Opp.* at 6:3. The only possible

6 relevance of this argument in *this* Court, however, is to urge the Court to deliberately

7 tolerate legal error with the suggestion that a conviction is unlikely to be overturned

8 because of a deferential standard of review. That is an inappropriate argument for the

9 federal government and, of course, would be an improper basis for this Court's decision.

10 It goes without stating that a magistrate or district court cannot deliberately permit legal

11 error by hedging that the approach will survive harmless error review – and it certainly

12 goes without stating that this Court would never do so. The defense accordingly objects to

13 the government's argument that deficiencies in the indictment are simply harmless error

14 and should therefore be tolerated by this Court.

15 **III.   A Magistrate Court that Advises Defendants of the Maximum Statutory**
16   **Penalty Must Do So Correctly**

17   The government's first, and most curious, argument is that "[t]he government and

18 the Court are not required to inform the defendant of the maximum penalties he faces at

19 his arraignment . . . Because the government and the Court do not have to inform the

20 defendant of the maximum penalties that he faces, he cannot seek relief if an indictment

21 alleges that he is subject to a higher penalty than he believes he faces." *Gov't Opp.* at 4-5.

22   The government is correct that the text of Federal Rule of Criminal Procedure 10

23 does not require a defendant to be advised of the maximum penalties that he faces. *See*

24 FED. R. CRIM. P. 10. This Court, however, routinely informs every defendant arraigned of

25 the statutory maximum penalties of the charges in the indictment – as has every

26 magistrate in this district for at least the last twenty years.

27   Why do the magistrate judges advise defendants of the maximum penalties at

28 arraignment? One very important systemic reason is that it protects the government

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1 against later attacks on convictions, on allegations that the defendant was unaware of the

2 statutory maximum penalties. *See, e.g., United States v. Gray*, 611 F.2d 194, 201 (7th Cir.

3 1979) (rejecting attack on sufficiency of advisement at guilty plea because defendant had

4 been properly advised of statutory maximum penalty at arraignment).

5   The government's current position – that Mr. Herrera-Santos is not entitled to be

6 advised of the correct statutory maximum penalties because he is not entitled to be

7 advised of the maximum penalties at all – presents a number of options for this Court, and

8 for all magistrates in this district:

9   **Option One – Stop advising all defendants of their statutory maximum**

10 **penalties:** To avoid the danger of advising Mr. Herrera-Santos of the *incorrect* statutory

11 maximum penalty, the magistrates may decide to stop advising defendants of the

12 maximum penalties altogether. Habeas counsel would certainly welcome that approach; it

13 would mean one less fact in the record proving that a defendant's plea was knowing and

14 voluntary. It is unclear in the government's Opposition, however, if the United States

15 Attorney's Office is now asking that *no* defendant be advised of the statutory maximum

16 penalties in the Northern District of California;

17   **Option Two – Stop advising *illegal reentry* defendants of their statutory**

18 **maximum penalties**: Another way to avoid deciding what the correct statutory maximum

19 penalties are for these flawed illegal reentry indictments would be for the magistrate

20 courts to not advise *illegal reentry* defendants of the penalties at arraignment. This policy

21 would, however, raise serious Equal Protection concerns. If United States citizens are

22 fully and fairly informed of their charges and the statutory maximum penalties,[2] indigent,

23 (primarily) Mexican, illegal-reentry defendants should receive the same advisements;

24   **Option Three – Advise illegal reentry defendants *incorrect* statutory**

25 **maximum penalty**: The final course is the least attractive, but seems to be what the

26

27   [2] *See, e.g.,* Duff Wilson, *Bonds Pleads Not Guilty to Federal Charges*, NEW YORK

28 TIMES, Dec. 8, 2007, at http://www.nytimes.com/2007/12/08/sports/baseball/
08bonds.html?ref=baseball (visited Dec. 14, 2007).

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1   government urges in its Opposition. This Court – and all magistrate judges in the district

2   – could inform illegal reentry defendants of the incorrect statutory maximum penalties.

3   Defense objections could be rejected with the assurance that a defendant is not entitled to

4   be informed of the maximum penalties anyway, and is therefore not entitled to be

5   informed of the *correct* penalties.

6   As a simple matter of professionalism, it is hard to image than any judge in this

7   district would feel comfortable with this approach. Once a decision is made to advise

8   defendants of the statutory maximum penalties, the magistrate courts (aided by both

9   government and defense counsel) have a legal and ethical obligation to inform defendants

10   of the *correct* penalties.

11   To articulate the three options arising from the government's position on

12   advisement at arraignment is to reveal the fallacy of the argument. If the government

13   insists on standing by the current flawed indictment, this Court should inform Mr.

14   Herrera-Santos of the correct statutory maximum penalties. The correct statutory

15   maximum penalty for the offense charged in this indictment is two years in custody, and

16   one year of supervised release. *See* 18 USC § 3559(a)(5), 18 USC § 3583(b)(3). The

17   defense would respectfully request that Mr. Herrera-Santos be re-arraigned and informed

18   of the correct statutory maximum penalties.

19   **IV.   The Northern District of California United States Attorney's Office is the
          Only USAO in California that Does Not Indict in Conformance with *Salazar-*
20   ***Lopez***

21

22   The United States Attorney's Office for the Northern District of California is the

23   only USAO that does not indict illegal reentry cases in conformance with *Salazar-Lopez*.

     After *Salazar-Lopez*, United States Attorney's offices in other California districts are
24
     routinely alleging the date of a prior conviction, and the dates of subsequent removals, in
25
     illegal reentry cases. *See, e.g., Exhibit A*, *United States v. Mirno Pliego-Sanchez*, CR 07-
26
     01248 (C.D. Cal. Nov. 9, 2007) (alleging that at least one of the defendant's alleged
27
     deportations and removals occurred subsequent to defendant's conviction for specifically-
28
     identified aggravated felony convictions); *Exhibit B*, *United States v. Jose Luis*

1 *Hernandez-Rodriguez*, CR 07-0535 EIG (E.D. Cal. Nov. 29, 2007) (alleging that alien

2 had been removed after being convicted for specifically enumerated felony conviction).

3   The United States Attorney's Office in the Southern District of California does not

4 specify the type or nature of conviction, but does allege that the removal followed a date

5 that corresponds to that conviction. *See Exhibit C*, *United States v. Sergio Santos*, CR 07-

6 3216 IEG (S.D. Cal. Nov. 23, 2007) (alleging that removal subsequent to December 15,

7 2003). Without conceding that type of indictment is sufficient to satisfy *Salazar-Lopez*

8 (an issue contested by the Federal Defender of San Diego), it is notable that even the San

9 Diego indictments contain more information than the deficient indictments in the

10 Northern District of California.

11   The fact that United States Attorney's in three (much-larger) districts in California

12 routinely indict illegal reentry cases in compliance with *Salazar-Lopez* demonstrates that

13 complying with the new Ninth Circuit decision imposes no particular burden. Why the

14 Northern District of California United States Attorney's Office has decided to stand alone

15 against the dictates of *Salazar-Lopez* is unclear. What is clear, however, is that having

16 made that choice the government must be satisfied with the penalties that the *Herrera-*

17 *Santos* indictment carries: two years of custody, and one year of supervised release.

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Conclusion

2   This Court may fairly ask why it has been placed in the middle of this imbroglio,

3 when it would presumably be a simple matter for the government to return to the grand

4 jury and obtain a superceding indictment that conforms with *Salazar-Lopez* (as is

5 routinely done in every illegal reentry case in every other federal district in California). If

6 the present case proceeds to the district court with this indictment – and the twenty-year

7 statutory maximum penalties the indictment purportedly carries – the Honorable Susan

8 Illston will undoubtably ask the same question.

9   Whatever its reasons, this United States Attorney's office has elected to embrace

10 and defend the current flawed indictment. This Court should accordingly re-arraign Mr.

11 Herrera-Santos and advise him of the correct statutory maximum penalties: two years in

12 custody, and one year of supervised release.

13

14 Dated: December 14, 2007

15   Respectfully submitted,

16   BARRY J. PORTMAN
                                    Federal Public Defender
17

18   /s

19   STEVEN G. KALAR
                                    Assistant Federal Public Defender
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